

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions	:	
of	:	
AMJAK CONSTRUCTION COMPANY	:	DETERMINATION
AND TIBOR ROSENWASSER	:	
AND ZOLTON ROSENWASSER,	:	DTA NOS. 808112
AS OFFICERS	:	AND 808113
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1976	:	
through February 29, 1988.	:	

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Petitioners, Amjak Construction Company and Tibor Rosenwasser and Zolton Rosenwasser, as officers, 8 Filmore Court, Monroe, New York 10950, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1976 through February 29, 1988.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 17, 1992 at 1:15 P.M. Petitioners provided additional documentation for the record on June 8, 1992. The Division of Taxation responded to petitioners' submission on July 10, 1992. Petitioners appeared by Isaac Sternheim, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly requested and examined books and records for the entire audit period.

II. Whether the notices of determination were jurisdictionally defective and, therefore, invalid.

III. Whether the sales tax field audit conducted by the Division of Taxation utilized an audit method reasonably calculated to reflect the taxes due.

IV. Whether petitioners satisfied their burden of establishing that certain purchases were made on behalf of tax-exempt organizations and were therefore not subject to sales tax.

V. Whether petitioners have shown that their failure to comply with the Tax Law, if so determined, was due to reasonable cause and was not due to willful neglect.

#### FINDINGS OF FACT

On April 18, 1989, the Division of Taxation ("Division") issued four notices of determination and demands for payment of sales and use taxes due spanning the period June 1, 1976 through February 29, 1988 to petitioner Amjak Construction Company ("Amjak") assessing sales and use tax due in the amount of \$516,131.48, plus penalty (Tax Law § 1145[a][1][i]) and interest. On the same date, the Division issued a notice of determination for the period June 1, 1985 through February 29, 1988 to Amjak assessing a penalty of \$20,843.82 pursuant to Tax Law § 1145(a)(1)(vi). Subsequently, on June 23, 1989, the Division issued a notice of determination for the quarter ended November 30, 1985 to Amjak assessing a penalty of \$10,000.00 pursuant to Tax Law § 1145(a)(3)(i). On the same dates, the Division issued identical notices of determination and demands for payment of sales and use taxes due spanning the same periods and assessing the same amounts as above to petitioners Tibor Rosenwasser and Zolton Rosenwasser, as officers of Amjak. The notices indicated that they were personally liable as officers of Amjak for taxes determined to be due from the corporation. The notices were based upon the results of a field audit of the business operations of Amjak as described hereinafter.

On September 28, 1987, the Division sent a letter to Amjak advising that the corporation's sales tax returns were scheduled for field audit. The period under audit was stated in the letter to be from the "date business began" to the "present". The letter requested that all books and records pertaining to the sales tax liability for the period under audit be made available. The books and records to be provided included journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all sales tax records. On November 20, 1987, the Division sent an identical letter to Amjak requesting that its books and

records be made available for audit. This letter, however, did not indicate the audit period. On the same date, a second letter was sent by the Division to Amjak's representative, Mr. Isaac Sternheim, requesting that a power of attorney be completed by the date that the audit was to commence. The letter further stated that "[a]s of this date, the audit period has not yet been determined."

At a meeting held on December 21, 1987 with the auditors, Amjak's representative agreed that the audit period would be July 1, 1976 through February 29, 1988. This period was placed upon the power of attorney in which Amjak appointed Mr. Sternheim to represent it in this matter. At the meeting, the auditor requested all of Amjak's records for the entire audit period. As so few records were provided, the auditor requested that the following records be made available for review in order to continue the current audit:

- |   |                   |
|---|-------------------|
| 1. sales invoices   | 4/1/85 - 3/31/86  |
| 2. purchase invoices for:                                   | 4/1/85 - 3/31/86  |
| material purchases  |                   |
| subcontractor purchases                                     |                   |
| job expenses  |                   |
| 3. purchase invoices for:                                   | 10/1/85 - 3/31/86 |
| advertising expenses  |                   |
| delivery expenses   |                   |
| 4. fixed asset invoices                                     | 6/1/79 - 11/30/87 |
| 5. sales journal  | 4/1/85 - 3/31/86  |
| 6. cash disbursements journal                               | 4/1/85 - 3/31/86  |
| 7. supporting documentation for claimed<br>nontaxable sales |                   |
| 8. contracts applicable to sales invoices                   | 4/1/85 - 3/31/86  |

On January 5, 1988, the auditor sent a letter to Amjak's representative requesting that the same books and records for the same periods be made available for review. In response, Amjak provided the auditor with its U.S. corporation income tax returns, Form 1120, for the fiscal years ended March 31, 1982, 1983, 1984 and 1985. Its representative explained to the auditor that all of the sales of Amjak were capital improvements and most of the materials were purchased for the building of a synagogue.

On March 22, 1988, the auditor left for Mr. Sternheim a request for the following information "to continue with the current audit of your client":

- |                   |                  |
|-------------------|------------------|
| 1. sales invoices | 4/1/85 - 3/31/86 |
|-------------------|------------------|

2. supporting documentation to support nontaxable sales
3. contracts applicable to sales invoices 4/1/85 - 3/31/86
4. purchase invoices
  - subcontractor purchases 4/1/85 - 3/31/86
  - job expenses 4/1/85 - 3/31/86
5. the 35 remaining material suppliers to be reviewed
6. purchase invoices
  - advertising expenses 10/1/85 - 3/31/86
  - delivery and trucking expenses 10/1/85 - 3/31/86
7. fixed asset invoices for all purchases 6/1/79 - 11/30/87
8. sales journal 4/1/85 - 3/31/86
9. Federal tax return - FYE 3/31/87
10. general ledger
  - sales and material purchases 4/1/84 - 3/31/85
  - 2/1/87 - 3/31/87

Amjak is in the construction business and is located in the Hasidic community of "Kiryas Joel", in Monroe, New York. During the years at issue, Tibor Rosenwasser was the president of Amjak and Zoltan Rosenwasser was its secretary. There are several references in the audit report which indicate that the business began operating on July 1, 1979. In addition, Mr. Tibor Rosenwasser testified at the hearing that the business began "in the late 1970's". Amjak was not registered as a New York State vendor for sales tax purposes until July 1987. Although requested to do so, Amjak did not provide its sales journal, cash receipts journal, purchases journal, sales invoices and contracts relating to its construction business to the auditor. On at least three separate occasions, Amjak was requested to provide exemption certificates relating to the building of the synagogue; however, one was not provided during the period that the audit was being conducted.

The purchase invoices, sales invoices, sales and construction contracts and documents that identified construction jobs were either missing or unavailable. The books and records did not allow for an opportunity to trace any transaction back to the original source because insufficient books and records were made available. In addition, the auditor determined that gross sales per the records available for the fiscal year ended March 31, 1986 were not in substantial agreement with the sales reported on the Federal income tax return and the sales and use tax returns for the same period. It was also determined by the auditor that purchases per the records available for

the same fiscal year were not in substantial agreement with purchases reported on the Federal income tax return covering the same period.

The auditor reviewed Amjak's asset account and assessed assets in the amount of \$137,618.00, resulting in tax due of \$9,633.26. The auditor assessed Amjak's asset acquisitions because no bills or invoices for any of the asset acquisitions for the audit period were made available for review.

In order to test purchases during the audit period, the auditor reviewed the cash disbursements journal and the purchase invoices for the period April 1, 1985 through March 31, 1986. The auditor began by transcribing the material purchase transactions for the fiscal year ended March 31, 1986 from Amjak's cash disbursements journal. The auditor then reviewed the entire year's purchase invoices to determine if sales tax had been paid. This test included a total of 136 transactions involving 43 suppliers and \$492,444.00 in purchases. Only the purchase invoices of two of the 43 suppliers had the sales tax added to the purchase amount. The review of the purchase invoices resulted in an error rate of 90.025 percent which was applied to Amjak's purchases for the fiscal years ended March 31, 1982, 1983, 1984 and 1985 as indicated on Amjak's U.S. corporation income tax returns. The last year's purchases were obtained from the general ledger. To obtain the purchase amounts for the other years of the audit, the average from these 5 years was used. The application of the error rate to purchases resulted in additional use tax due of \$506,498.22.

For the entire audit period, the auditor imposed upon Amjak a penalty for failure to file and pay over the sales and use taxes due. For the period June 1, 1985 through February 29, 1988, the auditor imposed upon Amjak a penalty for omitting in excess of 25 percent of the amount of the taxes required to be shown on the sales and use tax returns. Finally, penalty was imposed upon Amjak for its failure to obtain a certificate of authority.

Amjak's position is that the material it purchased was used in the construction of a synagogue and associated housing on behalf of an exempt organization, Congregation Yetev Lev D'Satmar, Kiryas Joel, Monroe, New York. It is undisputed that the Congregation was an

exempt organization under the Tax Law during the years at issue. Amjak submitted into the record of this matter various documents in support of its position:

- (a) contractor exempt purchaser certificate of Monfield Homes, Inc., dated June 5, 1981, showing Amjak as the vendor and Congregation Yetev Lev as the project.
- (b) exempt organization certification of Congregation Yetev Lev D'Satmar, dated June 4, 1981, showing Amjak as the vendor;
- (c) letter dated March 8, 1983 from Congregation Yetev Lev stating that the houses being built by Amjak in the village of Kiryas Joel were being built for the Congregation;
- (d) letters from various suppliers which stated that Amjak had not been charged sales tax because the materials had been delivered to and used at the property of the Congregation and a tax-exempt organization certificate had been received;
- (e) purchase invoices from various suppliers to Amjak which indicated delivery was for the Congregation Yetev Lev job;
- (f) purchase invoices to Amjak with no indication as to the destination of the supplies purchased;
- (g) purchase invoices to Amjak indicating delivery of the materials purchased to Kiryas Joel or a lot designation;
- (h) numerous checks written to Amjak by both the Congregation Yetev Lev and Monfield Homes, Inc.; and
- (i) a standard form small construction contract dated in 1981 between Monfield Homes, Inc. and Amjak to build three buildings consisting of four residential units per building. The buildings were to be constructed in the Forest Acres Subdivision, Village of Kiryas Joel, Orange County, New York.

Amjak introduced into the record of this matter purchase invoices which it claims relate to the fixed asset purchases reviewed and assessed upon audit. According to Amjak, the cost of the fixed assets was reduced by three percent prior to being posted in the general ledger in order to account for accelerated depreciation. Applying this reduction to the invoices supplied, it is

determined that Amjak has presented invoices showing tax paid relating to the following fixed assets assessed by the auditor:

<u>Description</u>	<u>Date Placed In Service</u>	<u>Cost</u>	<u>Use Tax Assessed</u>	<u>Sales Tax Paid</u>
Furniture & Fixtures	7/15/79	\$ 2,214.00	\$ 154.98	\$ 87.78
Delivery Equipment	7/6/84	15,496.00	1,084.72	931.25
Delivery Equipment	4/1/84	11,561.00	809.27	706.32
Delivery Equipment	1/11/85	9,491.00	664.37	609.38
Fixtures	5/15/83	3,202.00	224.14	165.01
Furniture & Fixtures	12/10/85	996.00	69.72	60.40
Office Equipment	12/10/85	950.00	66.50	57.61
Office Equipment	10/15/85	1,856.00	129.92	112.55
Furniture & Fixtures	11/15/85	3,753.00	262.71	227.59
Office Equipment	11/15/85	23,750.00	1,662.50	1,440.27
Office Equipment	11/15/85	1,943.00	136.01	<u>117.83</u>
				<u>\$4,515.99</u>

The remaining invoices presented by Amjak do not correlate to any of the fixed assets assessed through the audit.

#### CONCLUSIONS OF LAW

A. As a contractor, Amjak's purchases of tangible personal property for use or consumption in construction are considered retail sales and therefore subject to the imposition of sales and use tax (Tax Law §§ 1101[b][4][i]; 1105[a]).

The Division has the authority to determine, "from such information as may be available," the amount of tax actually due from a taxpayer for a given period when any one of its sales tax returns is either not filed or states an incorrect or insufficient amount of tax due (Tax Law § 1138[a][1]). When the vendor maintains a comprehensive set of books and records, "such information as may be available" (Tax Law § 1138[a][1]) is restricted to his books and records, and not external indicia, because "[t]he honest and conscientious taxpayer who maintains comprehensive records as required has a right to expect that they will be used in any audit to determine his ultimate tax liability" (Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41, 43).

To determine the adequacy of a taxpayer's records, the Division must first request (Matter of Christ Cella v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858, 859) and thoroughly

examine (Matter of King Crab Restaurant v. State Tax Commn., 134 AD2d 51, 522 NYS2d 978, 979-80) the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, 76, lv denied 44 NY2d 645, 406 NYS2d 1025; Matter of Giordano v. State Tax Commn., 145 AD2d 726, 535 NYS2d 255, 256-57; Matter of Urban Liquors v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138, 139; see also, Matter of Hennekens v. State Tax Commn., 114 AD2d 599, 494 NYS2d 208, 209), that they are, in fact, so insufficient that it is "virtually impossible [for the Division] to verify taxable sales receipts and conduct a complete audit" (Chartair, Inc. v. State Tax Commn., supra, 411 NYS2d at 43; Matter of Christ Cella v. State Tax Commn., supra), "from which the exact amount of tax due can be determined" (Matter of Mohawk Airlines v. Tully, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (Matter of Urban Liquors v. State Tax Commn., supra). The estimate methodology utilized must be reasonably calculated to reflect taxes due, but exactness is not required from such a method (Matter of W. T. Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, 157, cert denied 355 US 869; Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, 177).

B. The first issue to be addressed is whether the Division made an adequate request for all books and records for the period of assessment, June 1, 1976 through February 29, 1988. The initial written request for books and records was dated September 28, 1987 and stated the audit period to be from the "date business began" to the "present". The next written request for books and records did not contain an audit period. At the December 21, 1987 office visit, the audit period was established to be June 1, 1976 through February 29, 1988. The auditor's log contains an entry regarding a request for Amjak's books and records which occurred at the December 21, 1987 meeting and the log entry states that the request was for all the records of the entire audit



period. The later written requests for records were limited to one-year periods, except for fixed assets, which were requested for the period June 1, 1979 through November 30, 1987.

The use of the word "present" in the request creates ambiguity in attempting to ascertain the closing date of the audit period. The request could be reasonably interpreted to require Amjak to produce books and records for the audit period up to the date the auditor's letter was written, postmarked or received, or the date of the appointment. The entry in the auditor's log does not specify the dates covered by the request. As such, it cannot be determined whether this request was specifically clear so as to put Amjak on notice as to the period for which records were to be produced. The record does not support a finding that the auditor made a clear and explicit request for books and records for the final two quarterly periods. Accordingly, the Division's resort to external indices to assess Amjak's tax liability for the quarters ended November 30, 1987 and February 28, 1988 was premature and improper (see, Matter of Christ Cella v. State Tax Commn., supra; Matter of Top Shelf Deli, Tax Appeals Tribunal, February 6, 1992).<sup>1</sup>

The fact that Amjak's representative agreed to the audit period during the December 21, 1987 meeting involving the power of attorney does not aid the Division here. Mere knowledge of the audit period does not obligate Amjak to produce books and records for this period.

Therefore, even though Amjak acquired actual notice of the audit period at some point during the audit, the Division remained obligated to explicitly request books and

records for these periods (see, Matter of Top Shelf Deli, supra). As for the beginning of the audit period, the "date business began" must be determined, as this is the phrase used by the Division in its initial request for Amjak's books and records. There are several references in the

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<sup>1</sup>It is noted that although the Division requested fixed asset purchase invoices through November 30, 1987, the last fixed asset assessed use tax was purchased on November 15, 1985 and related to the sales tax quarter ended November 30, 1985. Therefore, although the Division could have assessed Amjak for fixed assets purchased through November 30, 1987, no such purchases existed for this quarter.

audit report which state that the business began on July 1, 1979. Although these references are based upon information received from Amjak, it appears that the Division accepted this date as evidenced by its request for fixed asset purchases for the period June 1, 1979<sup>2</sup> through November 30, 1987. Therefore, the beginning of the audit period is deemed to be July 1, 1979. The Division is directed to cancel the amounts assessed prior to July 1, 1979 and after August 31, 1987.

C. During the years in issue, Tax Law § 1138(former [a]), in pertinent part, provided as follows:

"(1) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors . . . .

"(2) Whenever such tax is estimated as provided for in this section, such notice shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated; that the tax may be challenged through a hearing process; and that the petition for such challenge must be filed with the tax commission within ninety days."

D. The issue of whether compliance with the language of section 1138(a)(2) advising a taxpayer that tax was estimated is a condition

precedent to the validity of such notice or whether such omission constitutes an irregularity and not a fatal defect was addressed by the Tax Appeals Tribunal in Matter of Jericho Delicatessen (July 23, 1992) and Matter of Negat, Inc. (April 9, 1992). Having reviewed the legislative history of the statute, the Tribunal stated:

"We find nothing in this legislative history which supports the conclusion offered by petitioners and embraced by the dissent that the Legislature intended that a failure of exact compliance with the language of the statute to be a fatal defect which renders the notice invalid. Indeed, we find such a result drastic and somewhat unrealistic in that it would have us conclude, in effect, that the Legislature intended that the validity of the entire process depended on the

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<sup>2</sup>This date is the beginning of the sales tax quarter covering the date July 1, 1979.

Division's compliance with but one single requirement of section 1138(2) [sic]. On the contrary, it is clear that the Legislature's expressed intention was to insure that taxpayers were informed of the nature of the assessments against them so that they could properly respond to those assessments through the protest procedures provided to them. It is also abundantly clear that the Division's failure to 'check the box' on the notice, thereby indicating that the assessment was estimated, did not frustrate the plan of the Legislature to safeguard petitioners' rights." (Id.)

E. As in Jericho and Negat, Amjak was aware that the Division was engaged in an audit of its business; that a request for its books and records had been made for the audit; that Amjak or its representative had not provided the Division with the bulk of such records; and that what records were provided were insufficient to conduct a proper audit. Given these facts, the Tribunal in Jericho and Negat held that the taxpayers were not misled or prejudiced and enjoyed every privilege which a formally correct notice would have given them, a result consistent with Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin. (Sup Ct, Albany County, March 16, 1988, affd on other grounds 151 AD2d 822, 542 NYS2d 61). Therefore, the notices issued to petitioners herein are valid.

F. It is clear that Amjak's purchase and sales records were inadequate, given the lack of invoices relating to fixed asset purchases and the lack of purchase invoices relating to tangible personal property. In addition, Amjak failed to provide a copy of the contracts relating to the building of a synagogue. Finally, the lack of books and records relating to material purchases led the auditor to conclude that he could not trace the tangible personal property from the point of purchase to its installation in a building constructed for an exempt organization. Under these circumstances, the use of an indirect audit method was appropriate (Matter of Licata v. Chu, 64 NY2d 873, 487 NYS2d 552; Matter of Vebol Edibles v. Tax Appeals Tribunal, 162 AD2d 765, 557 NYS2d 678, lv denied 77 NY2d 803, 567 NYS2d 643).

G. Since the resort to a test period audit was justified, the next issue to be addressed is whether petitioners met their burden of demonstrating by clear and convincing evidence that the method of audit or the amount of the tax assessed was erroneous (Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679; Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451).

Tax Law § 1115(a)(15) exempts from sales and use taxes receipts from the following:

"Tangible personal property sold to a contractor, subcontractor or repairman for use in erecting a structure or building of an organization described in subdivision (a) of section eleven hundred sixteen, or adding to, altering or improving real property, property or land of such an organization, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property."

Included among the organizations described in Tax Law § 1116(a) are corporations, associations or trusts organized and operated exclusively for religious purposes. Pursuant to the exemption cited above, Amjak's purchases of materials which became "integral component parts" of buildings of an exempt organization were exempt from sales tax. Purchases of tangible personal property incorporated into the real property of an exempt organization by subcontractors are accorded the same treatment as purchases by the prime contractor (20 NYCRR 541.3[d][2][ii]). All other purchases made by Amjak do not qualify for exemption under Tax Law § 1115(a)(15) and are, generally, taxable as retail sales pursuant to Tax Law §§ 1101(b)(4)(i) and 1105(a).<sup>3</sup>

H. Exempt organizations such as the Congregation Yetev Lev are issued, upon application, a numbered exempt organization certification by the Department of Taxation and Finance. A properly completed exempt organization certification issued by an exempt organization to a contractor constitutes proof of the organization's exempt status for purposes of State and local sales and use taxes (20 NYCRR 541.3[c]). For recordkeeping purposes, the prime contractor must retain its customer's exempt organization certification as part of its

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<sup>3</sup>Tax Law § 1101(b)(4)(i) defines retail sale, in pertinent part, as follows:

"[A] sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale . . . ."

Tax Law § 1105(a) imposes sales tax on all retail sales of tangible personal property, except where otherwise provided.

records. Copies of the certificate must also be furnished to all subcontractors on the job. The subcontractors are required to retain a copy of the certificate in their records with a copy of the contract which identifies the project and the

location. When purchasing tangible personal property for incorporation into the exempt project, the prime contractor and subcontractor will issue a properly completed contractor exempt purchase certificate to the supplier (20 NYCRR 541.3[d][2][v][B]).

The documentation presented by Amjak is insufficient to establish a link between the materials purchased and reviewed upon audit and the incorporation of such material into a building or structure owned by an exempt organization. Amjak has not presented a contract with the Congregation for the building of a synagogue or related housing. Thus, there is no proof in the record that Amjak was constructing any buildings for an exempt organization. The contractor exempt purchaser certificate introduced into the record of this matter relates to Monfield Homes, Inc. The contract provides for the construction of a residential structure with three units for a total cost of approximately \$300,000.00, an amount less than one year's average material purchases. The relationship, if any, between Congregation Yetev Lev and Monfield Homes, Inc. was never explained or substantiated. Most of the purchase invoices failed to indicate that the materials were being purchased for or delivered to the Congregation Yetev Lev project. Some of the purchase invoices indicated delivery to Kiryas Joel or a particular lot designation, but the invoice failed to show the project in which the materials were to be used. The lot designations were not explained. Those invoices indicating delivery to Congregation Yetev Lev cannot be tied into any contractual arrangement between Amjak and the Congregation. In sum, the records of Amjak do not provide an audit trail from the purchase of materials to their incorporation into a building owned by an exempt organization such that the purchases would be exempt from the imposition of sales and use tax.

I. With regard to the fixed asset purchases, Amjak has established through the introduction of purchase invoices that it is entitled to a credit of \$4,515.99 as shown in Finding

of Fact "6". These invoices correspond to the fixed assets assessed as to their description, date placed in service and original cost less the three percent accelerated depreciation taken by Amjak. The remaining invoices presented do not correspond to the fixed assets assessed in the audit and therefore do not provide a basis for an adjustment to the audit findings.

J. Tax Law § 1145(a)(1)(i) authorizes the imposition of penalty for failure to file a return or to pay over any tax under Article 28 in a timely manner. Section 1145(a)(1)(vi) imposes an additional penalty where the taxpayer omits from the total amount of taxes required to be shown on a return an amount which is in excess of 25 percent of the amount of the taxes required to be shown on a return. In both cases, the penalty may be abated, if the delay or failure to pay was due to reasonable cause and not due to willful neglect (Tax Law § 1145[a][1][iii], [vi]). The taxpayer bears the burden of establishing reasonable cause as well as the absence of willful neglect (see, e.g., Matter of T.V. Data, Inc., Tax Appeals Tribunal, March 2, 1989).

Inasmuch as Amjak's failure to accurately report its purchases seems to be caused by its failure to maintain records relating to specific purchases and contractual arrangements, such failure appears to result from Amjak's own neglect and not any reasonable cause. As Amjak failed to prove any facts which establish reasonable cause for its failure to pay the tax due, there is no basis to abate the penalties imposed. In addition, it was proper to impose upon Amjak the penalty for failing to obtain a certificate of authority.

K. The petitions of Amjak Construction Company and Tibor Rosenwasser and Zolton Rosenwasser, as officers, are granted to the extent indicated in Conclusions of Law "B" and "I" and the notices of determination and demands for payment of sales and use taxes due dated April 18, 1989 and June 23, 1989 are to be modified accordingly. Except as so modified, the notices are sustained.

DATED: Troy, New York  
March 11, 1993

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE